

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY TODD PELL,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 242272

Montcalm Circuit Court

LC No. 02-000377-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and now appeals as of right. He was sentenced to life in prison without the possibility of parole as mandated by law. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury pursuant to CJI2d 7.15, Use of Deadly Force in Self-Defense. This Court has ruled that “a trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case.” *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). This Court has also ruled that “[t]he determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court.” *Id.*

Defendant maintains that the self-defense instruction was appropriate, based on the argument that he was intoxicated and that the victim punched him in the face inside his trailer while he was asleep. Defendant exercised his constitutional right not to testify; therefore, we must review his statement to police and trial testimony to determine if a self-defense instruction was supported by the evidence.

The trial court referred to the statement made by defendant to police in deciding not to instruct the jury on self-defense. As acknowledged by defendant in his appellate brief, the statement included defendant’s assertion that “someone hit me in the face and I got up and I reacted with force *as they were going out the door.*” Additionally, defendant stated that he “knocked her out of the door.” Further, defendant told police that he stabbed the victim while she was outside his trailer.

Our Supreme Court has discussed the generally applicable rules concerning self-defense, noting that “[a]t common law, a claim of self-defense, which ‘is founded upon necessity, real or apparent,’ may be raised by a nonaggressor as a legal justification for an otherwise intentional homicide.” *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002), quoting 40 Am Jur 2d, Homicide, § 138, p 609. The *Riddle* Court, quoting *People v Lennon*, 71 Mich 298, 300-301; 38 NW 871 (1888), further addressed the parameters of self-defense, stating:

“[T]he question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger?” [*Riddle*, *supra* at 126-127 (alteration in original).]

“[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.” *Id.* at 127. A defendant’s honest belief in the danger need not be accurate in fact, but must be reasonable as measured by the circumstances as they appeared to the defendant rather than as they actually existed. See *People v Heflin*, 434 Mich 482, 503 n 16; 456 NW2d 10 (1990); CJI2d 7.15.

Here, the evidence was insufficient to support the proposition that defendant reasonably believed that his life was in imminent danger at the time he stabbed and killed the victim because his own statement to police indicated that the victim was knocked through the door and outside the trailer and that he proceeded to exit the trailer and stab her to death. CJI2d 7.15(5) provides that “a person may only use as much force as he thinks is necessary at the time to protect himself.” There was no evidence showing it to be necessary, at the time, for defendant to exit his trailer and then stab the victim. According to his own statement, defendant had repulsed any alleged assault and forced the victim outside, yet he proceeded to stab and kill her. There was no evidence that the victim attempted to reenter the trailer.

Defendant argues that the self-defense instruction was applicable, in that “one is never obliged to *retreat* from a sudden, fierce, and violent attack, because under such circumstances a reasonable person would, as a rule, find it necessary to use force against force without retreating.” *Riddle*, *supra* at 129-130. Here, it was not a matter of defendant retreating, but rather defendant pursuing the victim outside his trailer and becoming the aggressor after the alleged single punch was thrown inside the trailer. There was no evidence suggesting that it was necessary to stab and kill the victim outside the trailer.

Next, defendant argues that the “castle doctrine” is applicable in the instant case. We note that defendant only requested CJI2d 7.15, and did not request CJI2d 7.17, No Duty to Retreat While in Own Dwelling, which provides that a person assaulted in his own home does “not have to try to retreat or get away,” but may “stand his ground and resist the intrusion.” Our Supreme Court has held that “the ‘castle doctrine’ permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force.” *Riddle*, *supra* at 142. However, as indicated

above, defendant's statement provides that deadly force was not used until the victim was outside the trailer. Our Supreme Court has held that "the castle doctrine is relevant only to acts of self-defense that take place in the dwelling; the doctrine has no application to 'a conflict outside the home.'" *Riddle, supra* at 140, quoting *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961). Therefore, the castle doctrine is inapplicable here. Overall, with respect to the requested instruction on self-defense, we cannot say that the trial court abused its discretion in declining to so instruct.

Defendant also argues that the trial court's failure to provide the requested self-defense instruction deprived him of an opportunity to present a defense. This Court has held that "a criminal defendant has a state and federal constitutional right to present a defense," and that "[i]nstructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). Here, defendant was not deprived of his right to present a defense as there was no instructional error, rather defendant simply failed to sufficiently present or cite evidence supporting self-defense.

Defendant next argues that the prosecutor failed to disprove, beyond a reasonable doubt, that he acted in self-defense. This Court has held that once evidence that supports a claim of self-defense is introduced, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *People v Elkhaja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), mod in part on other grounds 467 Mich 916; 658 NW2d 153 (2003); CJI2d 7.20. However, the evidence in the instant case did not support defendant's claim of self-defense, and the trial court properly declined to so instruct the jury. Therefore, the prosecutor had no burden to disprove that defendant did not act in lawful self-defense.

Defendant next argues that the prosecutor engaged in prosecutorial misconduct by referring to defendant's act of necrophilia, which was revealed when defendant's audio-taped statement was played for the jury. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

This issue was waived for purposes of appeal because defense counsel intentionally and affirmatively approved the playing of the tape for the jury, and the tape included the references to necrophilia as known by defendant. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, defendant cannot claim now that it was improper for the prosecutor to interject the matter of necrophilia during closing argument. Moreover, the evidence of necrophilia and the prosecutor's comments were permissible as explained below in the context of defendant's ineffective assistance of counsel claim.

Defendant claims that trial counsel was ineffective for failing to move for redaction of portions of the audiotape mentioning defendant's act of necrophilia. Defendant argues that the evidence of necrophilia was improper bad acts evidence, MRE 404(b), and that the evidence was not relevant, MRE 401, and unfairly prejudicial, MRE 403. Defendant maintains that the

evidence was inadmissible because it portrayed defendant as a bad man with a propensity to commit wrongful conduct.

The right to counsel guaranteed by the United States and Michigan Constitutions is the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The right to counsel is substantive, and focuses on the actual assistance received. *Id.* “To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). “Defendant must further demonstrate a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable.” *Id.* “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.*

We find that the evidence was properly considered by the jury, and because there was no basis for exclusion of the evidence and any challenge would have been meritless and futile, trial counsel was not ineffective for failing to seek redaction. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

The act of necrophilia occurred soon after the killing in the same location as the homicide and was part of the *res gestae*. It is well settled that evidence of other crimes, wrongs, or acts is inadmissible to show the defendant’s “inclination to wrongdoing in general to prove that the defendant committed the conduct in question.” MRE 404(b); *People v Vandervliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Evidence of other criminal or wrongful acts, however, are admissible when so blended or connected with the crime of which the defendant is charged that proof of one incidentally involves the other or explains the circumstances of the crime. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

This Court has noted that “[r]es gestae are circumstances, facts and declarations which so illustrate and characterize the principal fact as to place it in its proper effect.” *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981). Further, “the *res gestae* has been referred to as the ‘complete story.’” *Id.* “[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Where a jury needs to decide what happened during a private event between two persons, the more the jurors know about the full transaction, the better equipped they are to perform their sworn duty. *Id.* at 742.

In the instant case, defendant admitted that he engaged in sexual intercourse with the victim after killing her, as “a way to remember her.” During closing argument, the prosecutor referred to defendant’s action in the context of the circumstances surrounding the crime. Because the evidence of defendant’s act of necrophilia with the victim was so blended or connected with the crime of which defendant was accused that proof of one incidentally explained the circumstances of the crime, the evidence was admissible.

The evidence of necrophilia was relevant and not unfairly prejudicial because it had a bearing on defendant's argument to the jury that there was no intent or plan to kill the victim, nor was there any premeditation. The evidence could reasonably be viewed as showing defendant's extreme hostility, anger, and contemptuous feelings toward the victim, suggesting that he intentionally killed her by plan with premeditation. Further, the evidence could be viewed as being entirely inconsistent, with respect to defendant's state of mind, in relation to defendant's version of why the killing occurred. Therefore, counsel was not ineffective for failing to seek redaction of the audiotape, nor for objecting to the prosecutor's closing argument, because any challenge would have been meritless and futile. *Milstead, supra* at 401.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot